



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Blue Lake Forest Products, Inc.
File: B-224263
Date: February 9, 1987

DIGEST

While the protester argues that, under combined bid and auction procedures, the timber sale officer improperly advised and permitted bidders at bid opening to execute and submit a certificate of small business status, required to be submitted with the bid but mistakenly omitted from the bid package, there is no practical basis for objecting to this procedure where its invalidation would result in canceling the sale and all bidders had a fair opportunity to compete as qualified small businesses in the auction.

DECISION

Blue Lake Forest Products, Inc. protests the award of a contract to Eel River Sawmills under the Scallion Timber Sale conducted by the Forest Service, U.S. Department of Agriculture, using combined bid and auction procedures. The sale was set aside for preferential treatment of small business concerns. The protest is based on the awardee's failure to self-certify its small business status until after the time set for bid opening. The awardee did so at the instruction of the Forest Service which had inadvertently omitted the necessary form from the bid package.

We deny the protest.

The instructions in the bid package for the sale provided for an oral auction in which participation would be limited to bidders that initially submitted acceptable bids at or above a stated minimum price of \$385,163.50. The instructions further provided that to be acceptable, a bid must include an executed Certificate of Small Business Status, Forest Service Form R5-2400-152a, in which the bidder certified that it was a small business and agreed to sell no more than 30 percent of the timber to large businesses. A bid that did not include the required certificate would be eligible for award only if no bids were received from qualified small business concerns.

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Because the Forest Service discovered on the day before bid opening that it had inadvertently omitted the certificate form from the bid package, a Forest Service sale officer advised prospective bidders to submit their bids and that the omitted form would be distributed to the bidders for completion at bid opening. While the awardee and another bidder relied on this advice, the protester executed and included in its bid a form from another bid package. Shortly before bid opening, the other bidders again inquired about the procedure for submitting the certificate. The sale officer repeated her assurance that they would be given an opportunity to submit the forms at bid opening and told the bidders they did not need to reopen their sealed bids to submit the forms before bid opening.

After the time set for bid opening, the presiding officer announced that no other bids would be accepted and asked those bidders who did not submit a certificate to come forward and execute one before the opening of bids. The two bidders aside from the protester did so.

Eel River Sawmills offered the highest price of \$618,925.50 at the auction, and the protester offered the next highest price of \$617,859. The protester argues, however, that since its competitors' sealed bids failed to include the required certificate, those bids should have been rejected and the Forest Service should make award to the protester at its sealed bid price of \$392,273.50. We disagree.

It is not disputed that the Forest Service advised all the bidders that they could submit their sealed bids and then execute and submit the required certificate at bid opening. While the protester argues that this was improper, we are not aware of any statute or regulation that prohibits obtaining the certificate at bid opening. The protester argues that this procedure is inconsistent with the Forest Service Manual, which provides that bidders should not be permitted to certify their small business status after bids have been opened since a bidder could deliberately delay self-certification until determining whether there were any other small businesses competing; if there was none, the bidder could decide not to complete the certificate in order to avoid the limitation on the contractor's sales to large businesses. The Forest Service Manual, however, merely provides internal policy; a failure to comply with the Manual's provisions, therefore, does not affect the legal validity of the agency's actions. See Gene Peters, 56 Comp. Gen. 459 (1977), 77-1 CPD ¶ 225.

Published Forest Service regulations provide that the sale procedures must insure that open and fair competition occurs and that the government receives not less than fair market value for the timber. 36 C.F.R. § 223.89(a) (1985); Coultas Logging, Inc., B-222385, July 14, 1986, 86-2 CPD ¶ 64. Invalidating the bids of the protester's competitors would cause the protester's written bid of \$392,273.50 to be the only acceptable bid, whereas the auction resulted in a price of \$618,925.50. Since it is clear that the protester's bid offered less than the market value of the timber, a proper basis would exist for canceling the sale. See 36 C.F.R. § 223.100(a); Southwest Forest Indus., B-223646, Sept. 24, 1986, 86-2 CPD ¶ 343. In this regard, the Forest Service indicates the rejection of the other bids would result in a cancellation due to price unreasonableness. In these circumstances, sustaining the protest and requiring a recompetition would serve no practical purpose since the three bidders had a fair opportunity to compete as qualified small business concerns in the oral auction. See Southwest Forest Indus., supra.

We do recognize that under the procedures employed here, a bidder might scrutinize the attending bidders to determine whether or not it would be necessary to obligate itself to the limitation on sales to large businesses in order to compete for award, which would defeat the government's interest in promoting small businesses under the set-aside sale. In this case, it appears reasonably certain that all three bidders intended to obligate themselves to the limitation on sales to large businesses, since all of them made repeated inquiries and efforts to obtain the necessary form. In any event, as stated above, no practical purpose would be served by cancellation since the three bidders would be aware of their likely small business competitors in the recompetition. We nevertheless agree with the protester that the better course of action would have been for the sales officer to obtain the executed certificates before bid opening, and we are recommending by separate letter that the Secretary of Agriculture so advise its sales officers for future sales.

The protest is denied.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel